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No. 70-34

In the Supreme Court of the United States

OCTOBER TERM, 1971

SIERRA CLUB, INC., PETITIONER

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (App. 208–235) is reported at 433 F. 2d 24. The memorandum of the district court (App. 186–199) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. The petition for a writ of certiorari was filed on November 5, 1970, and was granted on February 22, 1971. 401 U.S. 907. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Sierra Club, a national conservation organization, has standing to challenge a decision by the Secretaries of Agriculture and Interior to develop public lands in the Mineral King Valley in California for public recreation, and the concurrent decisions to accomplish that development through private contractors and permittees.

2. If so, whether there was sufficient substance to a claim that the Secretaries of Agriculture and Interior lacked statutory authority to authorize the recreation project and related facilities to justify a preliminary injunction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant constitutional and statutory provisions and regulations are set forth in the appendix to petitioner's brief.

STATEMENT

Sequoia National Forest (including the Sequoia National Game Refuge, which is coextensive with the Forest as to all forest lands in issue in this case) and the adjacent Sequoia National Park are public domain lands of the United States. Congress has placed the administration of the Forest and Game Refuge in the Department of Agriculture and the administration of the Park in the Department of the Interior, to be exercised, respectively, under the direction of the Secretaries of Agriculture and Interior, subject to the provisions of 16 U.S.C. 1, 2, 5, 8, 497, 528, 531, 551 and 688. Additional restrictions are placed on the

Secretary of the Interior with respect to the Park by the provisions of 16 U.S.C. 43 and 45c.

The Mineral King Valley is the top part of a finger of national forest and game refuge land jutting into the southern portion of the Park. Indeed, it is naturally a part of the Park, and was excluded from it principally because of mining claims and other private property existing there at the Park's founding; its designation as a game refuge was intended in large part to assure that its administration would be park-oriented.[1] The Valley is a snow bowl surrounded on three sides by high mountains; it opens to the west, on a strip of Park land approximately six miles wide. Ever since the founding of the Park, access to the Valley has been by means of an unimproved road across this strip; the primitive condition of this road has been a factor substantially limiting the number of persons visiting Mineral King. (See A. 210, 230.)

In view of the Valley's prolific snows and convenient location near all of California's major population centers, the Forest Service has long been interested in developing Mineral King for skiing and other recreational use (see A. 47; see also *Mineral King: A Planned Recreation Development,* Forest Service, United States Department of Agriculture (1969)). Its most recent effort began in February 1965, when it issued a prospectus inviting bids for development of a recreational project there. Six bids were submitted, and the Forest Service chose the one

[1] See *infra*, pp. 51–52.

submitted by Walt Disney Productions, Inc. Disney then received a preliminary three-year permit to conduct studies and surveys of the Valley in order to develop its plans further. This permit provided that Disney would receive a 30-year term special use permit for up to 80 acres of Valley lands, and a revocable special use permit for additional acreage, if Disney's final plans were submitted and approved prior to the expiration of the study permit, and if an improved access road was contracted for and funded. The term of the study has since been extended to expire ninety days following conclusion of the present suit.

Disney's final plans were submitted and approved in January 1969 (A. 28). They propose an expenditure of about $35 million. Major facilities for up to 14,000 daily visitors (such as motels, restaurants, underground parking lots, administrative, service and maintenance facilities, a railroad station, hospital and swimming pools) are to be constructed on about 65 acres under a 30-year term permit. Auxiliary facilities, including trails, ski lifts, and portions of the tertiary sewage treatment facilities, occupying less than 400 acres, would be constructed within a 13,000-acre area of the Forest and Game Refuge under a nonexclusive, revocable, special use permit. Clause 15 of the special use permit provides that it "may be terminated upon breach of any of the [numerous]

conditions herein or at the discretion of the regional forester or the Chief, Forest Service."[2]

In connection with this project to develop public lands, the Department of the Interior was asked to issue a revocable permit to allow the State of California to replace 9.2 miles of the existing, substandard access road which traversed the adjacent Sequoia National Park, and to provide a right of way for an electrical transmission line through the Park. It has been clear from the start that development of the Valley would require substantially improved highway access through the adjacent strip of Sequoia National Park and electrical transmission lines to carry power to the development. To traverse the mountains which wall off the Valley from adjacent National Forest lands would add about an hour's driving time from the northern parts of the state, and would cost an estimated $78 million—more than three and one-half times the estimated $22 million construction costs for a road through the park; a tunnel under the park strip would also cost almost $80 million (A. 66, 62).

The proposed permit[3] (reprinted in Appendix A, *infra,* pp. 67–79) extensively and thoroughly

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[2] The 30-year term permit is not terminable at discretion, but may be terminated for breach of numerous specified conditions, including many designed to protect environmental values.

[3] Although as a result of the present suit the proposed permit was not executed, the parties have agreed on its terms and conditions.

provides for protection of park values. Thus, it requires the transmission line to be buried underground within the road prism (Clause 31). The road itself is to be built substantially with state funds. It will have two lanes with occasional, "carefully located" passing lanes on the uphill grade to permit passing of slow-moving service vehicles in winter, and a maximum design speed of 50 miles per hour (Clauses 16, 19). It will accommodate 700 to 800 autos per hour comfortably, experiencing peak loads of 1200 vehicles per hour (App. 61); if greater access capacity is ever required, the State has agreed that it will not seek "any further improvement of road access" through the Park (Clause 37). Before approving the road, the Department required California to undertake an ecological feasibility study. This was done by Professor Richard J. Hartesveldt (App. 83 *et seq.*). He advised that the road would not damage any of the Park's sequoias, provided that stated precautions were observed. Clause 26 of the permit specifically requires California to comply with the recommendation in the Hartesveldt report; more generally, Clause 16 states that "[d]esign and contruction must afford * * * protection" of environmental features. Clause 34 requires the State to comply with all standards set by the Federal Water Pollution Control Administration and other responsible federal and state agencies. The road fulfills specific park functions by embodying construction of scenic overlooks (Clause 20) and envisages access to interchanges within the Park (Clause 35). Design and construction of the road is, in all re-

spects, subject to departmental supervision and approval (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35).

Sierra Club, declaring that it had a "special interest in the nature of the uses proposed in the Sierra Nevada Mountains on behalf of the general public," brought the present suit against both Secretaries and their subordinates, seeking to enjoin construction of the recreation project (App. 3–11).

The complaint against Agriculture alleged that the Secretary's issuance of permits for the ski resort violated the Act establishing the National Game Refuge, 16 U.S.C. 688; exceeded the authority for recreational use and occupancy conferred by 16 U.S.C. 497 and 551; and violated the Forest Service's own regulations as to public hearings, 36 C.F.R. 211.20–211.119.

The complaint against Interior alleged that the plan to replace the approximately 9.2-mile segment of the existing route within the Park was illegal under the Acts establishing and regulating the Park, 16 U.S.C. 41, 43, 45c.[4]

The district court ruled that Sierra Club had standing as a plaintiff to seek injunctive relief because of its general interest in conservation matters. On the merits, it held that the Club had raised questions concerning possible excess of statutory authority "sufficiently substantial and serious to justify a prelimin-

[4] In the district court, petitioner also contended that the decision to permit construction of a transmission line across the Park without securing prior congressional approval was illegal. Both lower courts considered this contention on the merits, treating it as a *de facto* amendment of the pleadings.

ary injunction," which it granted against both Secretaries (App. 186–199).

On appeal, the court of appeals reversed on both aspects of the district court's holding (App. 208–235). With respect to standing, the majority found that the Club's asserted interest, as stated in its complaint, was entirely abstract, and hence insufficient to support the litigation. On the merits, the court was unanimous that no sufficient showing that the Club would be likely to prevail in challenging the discretionary actions of these officials of cabinet rank, or that it would suffer irreparable injury, had been made to warrant the district court's granting of preliminary relief. The court noted that the record disclosed that there are now at least 84 recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit, and found that this was "convincing proof of their legality" (A. 229). It specifically referred to the Forest Service's tabulation showing that many developments make use of combined term and revocable permits for substantial acreage, in some cases in excess of 6,000 acres.

SUMMARY OF ARGUMENT

It is our position that the court of appeals' decision in this case was correct for two reasons. First, petitioner has asserted an insufficient basis to establish its standing to bring this suit. And, on the merits of its claim, petitioner has not made the requisite

showing which would warrant the issuance of a temporary injunction.

I

Though it might have claimed a more traditional basis for standing, petitioner bottomed its claim only on a declared purpose to enforce an undifferentiated "public" interest in assuring that park and forest administrators obey governing statutes. Petitioner's claim to standing is that it has a "special interest," along with other persons for whom it has served regularly as a "responsible representative," in the protection, conservation, and maintenance of the public lands located in national parks, forests, and game refuges. This general concern with conservation matters does not, we submit, give petitioner, in the absence of a legislative conferral, standing to question decisions made by the responsible public officials concerning how these public lands shall be used.

Under the statutes creating national parks, forests, and game refuges, responsibility for the conservation and management of these areas is placed in the Secretaries of Agriculture and Interior, to be exercised on behalf of all American citizens. This responsibility is imposed, not in favor of a more limited group, but rather for the public at large. A claim of interest to assure that these public officers live up to their responsibility—and that is all petitioner has claimed here—is not enough, by itself, to entitle either a single member of the public or an organization like petitioner to seek judicial review of these officers' conduct of their public responsibilities.

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While recent decisions by this Court have significantly relaxed the technical requirements of standing, there still must be a showing of "injury in fact" by the party seeking to invoke federal court jurisdiction. *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150, 153. This requires a claim of individualized harm, which differentiates the complainant from the general public. Petitioner does not claim that it has suffered a distinctive or discriminating harm, which would differentiate it from the public at large for purposes of this litigation.

We are mindful that Congress has in some instances authorized one who lacks a discriminating interest in the subject matter at issue to challenge decisions by public officials with respect thereto. So long as there is a justiciable controversy in such cases, there are no constitutional strictures on Congress' power to permit such suits, even if the sole purpose is to vindicate the public interest. In the absence of a particularized judgment to permit such suits, however, an individual asserting an interest essentially limited to having the law obeyed has no standing to sue. A contrary view would undermine entirely the injury in fact requirement; if harm done to the public as a whole by official misapplication of national law is enough to constitute "injury in fact," then skillful pleading, including an allegation that the complainant is "interested" in the pending issue, is all that is needed to satisfy this requirement. This breaks sharply with the heretofore prevailing principle that a complainant should have some personal stake in the controversy, to assure

"concrete adverseness." *Baker* v. *Carr,* 369 U.S. 186, 204.

There has not been a legislative lowering of the injury in fact barrier to petitioner's suit. Unlike the "persons aggrieved" statutes applicable in other areas, none of the Acts here in dispute provide for judicial review of official action by private persons challenging harm to what they conceive of as the public interest. Nor in our view does the general "persons aggrieved" provision of the Administrative Procedure Act confer this right, since nothing in the history of that Act indicates that Congress intended to permit suits challenging official action on a "public interest" basis. Similarly, the National Environmental Policy Act, which does not deal with questions of standing under other Acts, is inapposite here since no claim under that Act is involved.

II

The court of appeals applied the correct standard to determine whether a preliminary injunction should issue in this case. Where the questions presented are grave and the injury to the moving party is certain and irreparable, while the injury to the opposing party will be slight or can be indemnified, the injunction should be granted. *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 815. If, on the other hand, the moving party does not show irreparable harm *to him,* then he must establish a "reasonable certainty" that he will prevail on the merits at a final hearing. *Unicon Management Corp.* v. *Koppers Co.,* 366 F. 2d 199, 204–205 (C.A. 2). And where, as here, a preliminary injunc-

tion is sought against public authority and the injury from delay cannot be adequately indemnified, the court may in the public interest withhold preliminary relief, though this may be burdensome on the movant. *Yakus* v. *United States,* 321 U.S. 414, 440–441.

In this case, no "irreparable injury," certainly not of the pertinent kind, has been shown. The proposed project, while it would produce certain irreversible changes, would not alter the basic use of the lands, for outdoors recreation by the public, and would be closely controlled to assure preservation of conservational values. Nor has petitioner shown that any injury that would occur would be an injury *to it*; again, petitioner's only claim is injury to the public at large. Finally, the public interest strongly militates against preliminary relief. The proposed project would affect only a small area of the public lands in this vicinity, and even within that small area environmental values would be carefully safeguarded; on the other side of the balance, delay would almost certainly result in a substantial inflation of costs that might jeopardize the entire project, a risk that cannot be readily, and has not been, indemnified against.

III

Petitioner has not shown, and, we submit, cannot show a "reasonable certainty" that it would prevail at final hearing on the issues which it tendered. Consideration of those issues should take place with an awareness of the geographic and historical realities of the Mineral King Valley and the National Park that practically surrounds it. The Park and Valley are integrally re-

lated by topography and nature. Indeed, the Valley was excluded from the Park for reasons irrelevant to the issues at hand; its designation as a national game refuge was intended to reflect its essential identity with the Park. Development of the Valley, then, may be quite properly viewed as a development of this integral land mass, for a use that is consistent with the larger scheme of all the public lands involved here.

The proposed project envisages development of permanent resort facilities on about 65 acres of Valley lands, to be leased to a concessionaire under a 30-year term permit. Other facilities, such as ski lifts and tows, sanitation facilities and the like, would be located on additional land in the Valley, totaling less than 400 acres, that would be leased under a nonexclusive, revocable permit. The Park is also involved; the State of California would be granted a permit to rebuild and improve an existing road that traverses some 9 miles of Park land to the Valley, and a right of way for a high voltage electric transmission line, to be buried in the road prism, would be authorized. The Secretaries of Agriculture and Interior, who, respectively, are charged with responsibility over the Valley and the Park, have authorized these matters as part of an overall development plan involving Valley and Park, subject, however, to close governmental control to assure full protection of environmental values. Their actions in this regard, we submit, did not exceed their statutory authority.

The Secretary of Agriculture has authority to combine fixed term and revocable use permits for operation of a resort on the national forest lands located

in the Valley. Congress has delegated broad management powers to the Secretary with respect to the national forests. The Secretary may issue term permits of up to 30 years, for up to 80 acres, for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation" (16 U.S.C. 497). The term permit to be issued here clearly is within this authorization. The Secretary has regularly and over many years issued revocable permits as well, under broad regulatory powers with respect to forest lands granted him by 16 U.S.C. 551, allowing uses and covering areas that go beyond the term permit limitations. Congress has explicitly recognized and tacitly ratified the Secretary's extensive revocable permit practice on numerous occasions. And the combining of term and revocable permits to facilitate the development of a desired project has also been a long-standing administrative practice, well known to, but never questioned by, Congress. The amendment of the term permit authorization to increase the acreage limits thereunder did not alter this. It was prompted by wholly unrelated considerations, and was not aimed at impairing in any way the Secretary's revocable permit practice. Indeed, at the time the amendment was enacted, as now, there were outstanding numerous combined term and revocable permits for total areas exceeding the term permit limits, even as increased by the amendment; at present, permittees under such combined permits have constructed more than $70 million of improvements on forest lands. Congress has evinced no intention to change this practice.

Nor is the project inconsistent with the Valley's status as a national game refuge. Public domain lands of this sort can properly be used for public recreation and for facilities to provide for this, where, as in this case, the development is carefully planned and controlled to protect environmental values. The designation of the Valley as a game refuge had but one purpose, to associate it with the Park as regards administration and policies. Thus, any use that would be proper on Park lands would be proper in the Valley. The proposed development fully accords with park uses.

The Secretary of the Interior has authority to permit construction of the replacement road. The new road would give such access only to other public domain (national forest) lands to be devoted to a use, public recreation, wholly proper in national parks. The federal officers responsible for the administration of these contiguous lands must and do cooperate in matters of common concern, and the road clearly serves this purpose. Moreover, in the broader sense required by the history of this region—in which Park and Valley were intended by Congress to be administered and developed as a closely inter-related unit—the new road would serve only a park purpose. The extraordinary safeguards for its construction and the limits on expansion assure that it would not pose any real danger to park values.

Granting the right of way for the electrical transmission line is also within the Secretary's authority. The Secretary has express power to do so. 16 U.S.C.

79 and 5. The proviso to 16 U.S.C. 45c on which petitioner relies, which requires congressional approval of electrical power plants and their associated facilities, including transmission lines, in national parks, has no application here. That provision was aimed only at excluding from park lands large hydroelectric power projects, and does not preclude the limited transmission facilities planned here. Even on more narrow grounds, these facilities would be proper park facilities, since they serve a park purpose in the broader sense appropriate in light of this region's history.

ARGUMENT

I

THE SIERRA CLUB LACKS STANDING TO BRING THIS ACTION CHALLENGING PROPOSED RECREATIONAL USES OF FEDERAL LANDS

It is evident that the past few years have brought a significant relaxation of the technical requirements for standing. As a result, a far wider class of individual and organizational plaintiffs has been found qualified to subject to judicial challenge governmental action which they claim affects their interest. And, as one commentator has noted, "[t]his development has introduced new life into the administrative process and compelled it to respond to forces and values which previously were underrepresented." Jaffe, *Standing Again,* 84 Harv. L. Rev. 633.

To date, however, this Court's decisions have dealt principally with the standing of individuals or groups claiming some interest which sets them apart from the

public as a whole. Here, although it apparently might have claimed a more traditional basis for standing,[5] petitioner based its claim only on a statute declaring an undifferentiated "public" interest, in this case an interest in the preservation of certain types of values in designated public lands. Whether a declared purpose to enforce such an interest is enough, by itself, to establish standing to challenge administrative action allegedly disregarding it is a question this Court has not yet determined. *E.g., Barlow* v. *Collins,* 397 U.S. 159, 172 n. 5 (opinion of Brennan, J.). While Congress has undoubted power to authorize such litigation, *Associated Industries* v. *Ickes,* 134 F.2d 694 (C.A. 2), vacated as moot, 320 U.S. 707, and indeed has before it bills which would grant petitioner the standing it claims, *e.g.,* S. 1032, 92d Cong., 1st Sess., in the absence of such authorization the undifferentiated public interest in assuring that park and forest administrators obey governing statutes is insufficient to establish standing to sue.

A. AN INDIVIDUAL CITIZEN WITH "A SPECIAL INTEREST IN THE CONSERVATION AND SOUND MAINTENANCE OF THE NATIONAL PARKS, GAME REFUGES AND FORESTS OF THE COUNTRY" AND A "PURPOSE TO PROTECT AND CONSERVE THE NATIONAL RESOURCES OF THE SIERRA NEVADA MOUNTAINS" WOULD HAVE NO STANDING TO SEEK JUDICIAL REVIEW OF THE ADMINISTRATIVE ACTS ALLEGED IN THIS CASE

The Sierra Club's essential claim to standing in this case is that it has a "special interest in the conservation and sound maintenance of the national parks,

[5] See the Brief *Amicus Curiae* for The Wilderness Society *et al.*, pp. 54–57; 62–63; *infra*, pp. 32–33.

game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested" and that "one of [its] principal purposes * * * is to protect and conserve the national resources of the Sierra Nevada Mountains" (A. 4). Under the statutes creating national parks, forests, and game refuges, generally, and the Sequoia National Park, Forest, and Game Refuge, in particular, such protection, conservation and maintenance is made a public responsibility of the Secretaries of Agriculture and Interior, on behalf of all American citizens. No claim is, or could be, made that these responsibilities are imposed in favor of a more limited group. A claim of interest to assure that these public officers meet their responsibilities is not enough, in itself, to entitle a single member of the public to seek review of their activities when he believes that they have not done so. More is required "than a common concern for obedience to law." *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 304.

The irreducible minimum requirement of standing reflects the constitutional limitation of judicial power to "Cases" and "Controveries"—"whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy.' * * * and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' " *Flast* v. *Cohen*, 392 U.S. 83, 101. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 [hereafter *ADAPSO*], and *Barlow* v. *Collins*, 397 U.S. 159, these two elements were restated as a requirement that there be an allegation of "injury in fact"

which the litigation could redress, and a showing that the interest sought to be protected by the plaintiff is "arguably within the zone of interests to be protected * * * by the statute * * * in question." *ADAPSO,* 397 U.S. at 153.

In most prior cases in this Court, the question of "injury in fact" has been quite simple. In *Hardin* v. *Kentucky Utility Co.,* 390 U.S. 1, *ADAPSO,* and *Investment Company Institute* v. *Camp,* 401 U.S. 617, for example, the claimants alleged that they were suffering competitive harm—an economic effect which sharply differentiated them from other members of the public at large. In *Barlow* v. *Collins, supra,* tenant farmers asserted that actions of the Secretary of Agriculture had permitted landlords to work economic coercion on them—again, a complaint of specific harm limited to a particular group. There was no dispute in any of these cases whether harm had been suffered; rather, the issue was whether that harm permitted the claimants to seek judicial relief. As Mr. Justice Brennan observed in his separate opinion in *ADAPSO* and *Barlow,*

> The more "distinctive or discriminating" the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the consitutional test [of injury in fact]. * * * The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. [397 U.S. at 172 n. 5.]

Here, however, petitioner cannot claim that it suffered a distinctive or discriminating harm. Its threshold

of pain, as it were, or perception of the harm alleged may be different from that of other citizens. But the Secretaries' duties in administering national lands run to the nation as a whole, not some particular group of citizens, and save for claims of individual interest or use, which have not been made in this case, the harm done by breach of those duties is done to the nation as a whole, not some special, self-appointed group.[6]

It does not follow that a citizen disturbed by decisions made in administering the national lands, but lacking a discriminating, personal interest in them, could under no circumstances be found to have standing to challenge those decisions.

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination * * * of * * * scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government.

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[6] Of course, it is often appropriate for such a group or organization to participate as *amicus curiae* in litigation which will affect matters of interest to it, but that is very different from the issue of whether such a group has standing as a party to invoke court jurisdiction which presumably would not otherwise be invoked.

> Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest.

Associated Industries v. *Ickes, supra,* 134 F. 2d at 704.[7] Leading cases in the courts of appeals which are often cited for expanding the law of standing are characterized by just such specific congressional judgments. *E.g., Scenic Hudson Preservation Conf.* v. *Federal Power Commission,* 354 F. 2d 608, 615 (C.A.

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[7] The context of this holding was somewhat different than the present case. The plaintiffs there were consumers of coal upon whom Secretary Ickes had imposed a price increase. Under the law as it then stood, however, they had no "legally protected interest" and so would have had no standing but for statutory provisions which permitted consumers to appear in the relevant administrative proceedings, established consumer interests as among those to be protected in the administration of the statute, and permitted an appeal by any "person aggrieved" as a party to the administrative proceedings. It is apparent that these coal consumers suffered a differentiating, discriminating harm through the higher prices, and thus would be found to have standing under *ADAPSO* and like cases without regard to either "legally protected interest" or a special facilitating statute. The court's reasoning remains valid, however, for cases like this one, where such harm is not claimed.

2) (statute requires consideration of environmental and recreational factors, and permits review at behest of any "aggrieved" party); *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994 (C.A.D.C.) (statute requires consideration of service to listening public, and permits review at behest of any "aggrieved" party).[8]

In the absence of such a legislative judgment, a citizen asserting an interest essentially limited to having the law obeyed should have no standing to sue. For if the harm done to the nation as a whole by official misapplication of national law is in itself enough to constitute "injury in fact," the concept ceases to have content, and the allied issues of standing and case or controversy, in this respect, become matters only of careful pleading. It need only be averred that the citizen is "interested" in a pending issue which he believes to have been decided against his interest to bring the matter before the court, assuming it to be otherwise reviewable.

Such an averment should be insufficient to establish the judicial character of the matter put before the court. A person with a roving commission to bring suits to challenge actions which he believes contravene an established public interest in which he shares would doubtless do so only when he felt it worthwhile to commit the necessary resources to litigation; to

[8] In *United Church of Christ*, it is also possible to isolate a discriminating or differentiating harm, that suffered by listeners subjected to discriminatory programming; in *Scenic Hudson*, as in the more recent *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (C.A. 2), certiorari denied, 400 U.S. 949, some but not all of the plaintiffs established such harm.

that extent, anyone who sues, whether he is from California or Tennessee, automatically has a "personal stake" in a controversy.[9] That stake, however, is a stake only in the issue which the citizen chooses to litigate; it lacks a "*concrete* adverseness which sharpens the presentation of issues." *Baker* v. *Carr,* 369 U.S. 186, 204 (emphasis added). A standard so malleable would invite "ill-defined controversies over constitutional issues," *United Public Workers* v. *Mitchell,* 330 U.S. 75, 90, and the bringing of cases which, because they were meant more to establish a point than to vindicate a concrete and pressing personal interest, would have a "hypothetical or abstract character." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240. There must be "a logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U.S. 83, 102, and that nexus must be sufficient to give confidence that every aspect of the situation will be explored. *United States* v. *Fruehauf*, 365 U.S. 146, 157.

Petitioner's handling of the standing issue in this case seems indicative of the kind of problems which might arise. It is apparent from the briefs of the *amici curiae,* particularly that filed by The Wilderness Society and others, that there may exist numerous, rather concrete relationships between the Sierra

[9] As Judge Frank observed in *Associated Industries*, *supra*, 134 F. 2d at 700 n. 6: "* * * [A]nyone has, in a certain sense, a 'right' to bring any kind of suit in any court; a man can institute an original action for divorce in the Supreme Court; his suit will be dismissed but he will only suffer costs, just as he would if he brought a suit in a court of proper jurisdiction and lost on the merits."

Club, its members, and one or another of the particular federal lands at issue here, which could support a claim of injury in fact. Petitioner has chosen to rely, however, only on its national interests in conservation and maintenance of public reserves and a general interest in the Sierra Nevada Mountains, where these lands are located. The effort appears to be to require the Court to decide a rather broad and sweeping question, when a narrower issue might suffice to resolve this aspect of the dispute. To be sure, counsel are entitled to shape their case as they think most likely to prevail; but the point of the Court's consistent concern for *concrete* interests on a litigant's part is to assure that these decisions are made with a view to winning the case, rather than some doctrinal point which may be thought important. If a simple assertion of interest in the problems with which an agency deals is enough to establish standing, no such assurance can be had.

Concreteness of harm is also an important factor in the presumption of reviewability, on which petitioner and the supporting *amici* lay much stress. Where a discriminating or differentiating injury has been suffered, the case for affording a right of review has already been made and it is proper to conclude that such review is not "cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140. A putative injury to the nation as a whole, on the other hand, does not invite such a response. The enforcement of public policies, in general, is placed in the hands of public officers, whose

performance is subject to review through the political processes. "To entrust the vindication of [a] public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress." *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 306 (Frankfurter, J., concurring for five members of the Court). There can be no assurance that such a litigant will not misstate the interest he claims to vindicate, or abandon some other interest which Congress equally meant to be considered in the solution of the problem at hand.

We believe it follows that review on allegations of failure adequately to assess, or of harm to, the public interest ought not to be entertained in the absence of a specific congressional judgment to permit it. The remedies which Congress chooses to afford or deny are as significant a part of the statutory structure as the apparent legal framework it creates.[10] Through the enactment of "person aggrieved" statutes in connec-

[10] Underlying much of petitioner's argument is the implicit premise that only the courts are both able and willing to superintend administrative compliance with statutory mandates. Congress is equipped to oversee the administration of its laws and, in fact, does so. See *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815. Congressional committees charged with supervising the administration of public lands continually monitor the activities of the Interior and Agriculture Departments and propose new legislation when changes are felt to be needed. Cf. *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339.

tion with specific federal agencies.[11] Congress has shown that it knows how to provide for such review; indeed, Congress has specifically authorized citizen suits to enforce clean air standards, see Section 304 of P.L. 91–604, 84 Stat. 1706, and, as petitioners and the *amici* point out, there are bills presently pending in Congress which would confer standing on citizens and groups such as the Sierra Club with respect to a broad range of environmental-public interest issues. S. 1032, 92d Cong., 1st Sess.; H.R. 49, 5074, 6862, 8331, 92d Cong., 1st sess. Where the issue is the enforcement of statutory policy,[12] any such appointment of "private attorneys general", *Associated Industries, supra,* should, we submit, be made by Congress, not this Court.

No contention could be made that any of the Acts creating the areas in dispute here, or concerning the administration of national parks and forests in general, envisaged suits brought by private persons challenging harm to what they conceive as the public interest. All were enacted in the days of the "legal interest" test, before the possibility of such actions was contemplated. Especially in the area of public

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[11] See, *e.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79x(a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 821*l*(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest").

[12] Where the issue is the enforcement of constitutional directives, as in the case of taxpayer suits brought to enforce the prohibitions of the First Amendment, *Flast* v. *Cohen, supra*, congressional definition of the requirements of "public interest" standing may not be required. Cf. *Bivens* v. *Six Unknown Named Agents*, No. 301, O.T. 1970, decided June 21, 1971.

lands, private individuals have no "legal interest" save as may be created in accordance with specific statutes authorizing private acquisition or use.

> Article 4, § 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Alabama* v. *Texas,* 347 U.S. 272, 273, quoting *United States* v. *California,* 310 U.S. 16, 29–30.]

For example, in the case of the national forests, Congress has required the Secretary of Agriculture to reach a balance among interests in outdoor recreation, range, timber, watershed, and wildlife and fish "in the combination that will best meet the needs of the American people." Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, 531(a). No one user or group has a special interest in the Secretary's allocation among these values which would distinguish that individual or group from the public at large.[13] "All the public lands of the United States are held in trust for the people of the whole country." *Light* v. *United States,* 220 U.S. 523, 537; *Camfield* v. *United States,* 167 U.S. 518, 524; *United States* v. *Trinidad Coal Co.,* 137 U.S. 160, 170.

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[13] Under a long-standing provision, 16 U.S.C. 500, county school and road districts are entitled to 25 percent of the receipts from timber sales within their county. Whether that provision would enable such a district to secure review, for ex-

Nor do we believe that the general "persons aggrieved" provision of the Administrative Procedure Act, 5 U.S.C. 702, embodies the necessary congressional judgment. That statute confers a right of review on persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*" (emphasis added). The clear import of the emphasized phrase is to direct inquiry about effect or aggrievement to another statute. So far as the legislative history shows, the phrase was meant only to incorporate by general reference those several statutes in which Congress had made specific reference to "persons aggrieved," rather than to expand the general scope of standing to seek judicial review—and this was the interpretation adopted by courts which first faced the question. *E.g., Pennsylvania R. Co.* v. *Dillon,* 335 F. 2d 292, 295 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 932 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Braude* v. *Wirtz,* 350 F. 2d 702, 707–708 (C.A. 9); see also Jaffe, *Judicial Control of Administrative Action* (1965) 528–531. We have already pointed out that the initial expansion of the standing concept came under statutes where that specific reference had been made. *Supra,* p. 21. To be sure, this Court held in *ADAPSO* and

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ample, of a decision to designate certain lands a wilderness area is an issue which this court need not reach here, since no special beneficial interest in one rather than another recreational use of these lands can be claimed. We note, however, our doubt that Congress ever contemplated that even these bodies could obtain review of the Secretary's managerial decisions affecting the use of forest lands.

Barlow v. *Collins, supra,* that Section 702 operates as an independent grant of standing to all "persons aggrieved," treating the reference to "a relevant statute" as raising only the question whether the alleged aggrievement is arguably within the zone of interests to be protected or regulated by the statute in question. But, for the reasons already stated, this holding is properly regarded as limited to the issues of "injury in fact" presented in those cases. Nothing in the history of the Act indicates that by passing it, Congress intended to permit citizen suits challenging administrative action on any issue affecting "public interests." [14]

Finally, the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. (Supp. V) 4321 *et seq.*, embodies no judgment regarding standing under the Acts at issue in this case. That Act is primarily concerned with the formulation of new administrative procedures to be followed in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. (Supp. V) 4332(C). In view of the timing of the events here at issue, petitioner makes no claims regarding compliance with the Environmental Policy Act. We are mindful that the recent expansion in the law of standing was well under way before the Environmental Policy Act was passed, so that it is ar-

[14] This conclusion seems particularly valid with respect to decisions affecting public interests in public lands. The Act specifically excludes such decisions from its rule-making requirements, 5 U.S.C. 553(a)(2), and, as here, decisions regarding allocation of public lands among competing possible public uses do not require formal adjudicatory procedures. Cf. 5 U.S.C. 554(a).

guable that its passage embodies a judgment to permit private suits to enforce its requirements. But the Acts in question here were passed at an earlier time, when, as we have shown, no such inference could be drawn. Nothing in the Environmental Policy Act deals with questions of standing under other Acts; such questions, as has already been stated, are before Congress now, and should await its particularized judgment.

B. THE SIERRA CLUB HAS NO GREATER CLAIM TO STANDING TO ASSERT PUBLIC INTERESTS THAN ANY PRIVATE CITIZEN HAS

The suggestion appears to be made that even if a private citizen has no standing to seek review of administrative decisions arguably affecting protected public interests, special interest groups such as the Sierra Club, Inc., should be recognized as having that right. We discern no basis for such a distinction. To be sure, the Sierra Club's interest in conservation matters is more focussed than that of the average citizen, just as is the United States Ski Association's interest in the development of the recreational potential of public lands. Such organizations serve a useful and salutary function in a complex society by providing rallying points for the lesser resources and partial interests of individual citizens. Still, the public interests they assert are those of the people, and if any individual in fact had the resources and interest to bring a suit such as this one, there is no reason why the court should deny him standing while according it to the organizational plaintiff.[15]

[15] Nor would there be assurance that all lawsuits challenging governmental administration of a particular project would be consolidated, or that the various courts whose jurisdiction is invoked would reach consistent results.

Even less persuasive is the apparent suggestion of the *amicus* Environmental Defense Fund (*Amicus* Br. at 33–41) that courts could develop qualifications tests for various groups which might claim to assert public interests, permitting standing only to those which were "responsible." Short of an affirmative showing that, in one case or another, there had been an abuse of process or that the group in fact did not represent the citizen interests claimed, we see no justification for judicial creation of such semi-official status. If an injury to asserted public interests is to be sufficient to support standing, then, as we have already noted, the very acts of filing and prosecuting a law suit seem to be sufficient to establish one's commitment to litigation of that issue. Moreover, any such inquiry would inevitably generate side issues of doubtful importance, but perhaps productive of substantial delay.

If an individual citizen, asserting his concern for the public interest, thereby establishes his standing to seek review of administrative action arguably affecting that public interest, then we see no reason why organizations such as the Sierra Club could not claim standing as representative of that interest. Our argument is that no individual citizen has standing to seek review on the basis merely of professed interest in rights assured by Congress to the pubic at large. Nor do we deny that in addition to its representational interests, an organization could have interests of its own which might be "injured in fact"—an interest in uncoerced membership (*N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449); in financial or proprietary interests (*Pierce* v. *Society of Sisters,* 268 U.S. 510); or the

like. Petitioner, the sole plaintiff in this case, has neither claimed nor shown any harm to interests which are distinct or different from those shared by the public as a whole. Thus, in our view, it has not yet shown any "injury in fact."

C. THIS COURT SHOULD NOT NOW CONSIDER THE ASSERTIONS OF AN AMICUS CURIAE THAT THE SIERRA CLUB, EITHER IN ITS OWN RIGHT OR AS REPRESENTATIVE FOR A SUBSTANTIAL PROPORTION OF ITS MEMBERS, HAS SUFFERED INJURY IN FACT

In the course of this litigation, the Sierra Club has consistently restricted the basis for its standing claims to an undifferentiated "interest in the preservation of conservational, recreational and aesthetic values" of the public lands concerned, alleging that the planned development—although concerned only with conservation, recreation and aesthetics—will threaten that interest. We have argued above, pp. 23–25, that that stance may reflect the general dangers of alleged "public interest" litigation unsupported by a concrete stake in the outcome—that is, a concentration on framing and arguing an issue thought to be of importance, rather than winning, on whatever grounds, a case on which the judicial power may act. An *amicus* now suggests that this stance is unnecessary, that the Sierra Club may indeed have interests which would establish an injury in fact which is "distinctive or discriminating" as between the Club and its members and the public at large. See the Brief *Amicus Curiae* for The Wilderness Society and others, pp. 62–63. We submit that any such claim must be made, in the first instance, by the plaintiff itself. Moreover, even if such a claim were made at this late stage in the proceedings,

the factual issues thus raised, which may vary as to the separate causes of action alleged, are not now appropriate for resolution in this Court. See *id.* at pp. 63–66.

II

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN DENYING SIERRA CLUB'S REQUEST FOR A PRELIMINARY INJUNCTION

There is no real dispute in this case over what is the proper standard for issuance of a preliminary injunction.

> Where the questions presented by an application for an interlocutory injunction are grave, *and* the injury *to the moving party* will be certain and *irreparable* if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. * * *

Ohio Oil Co. v. *Conway,* 279 U.S. 813, 815 (emphasis added). But if an irreparable injury to the plaintiff has not been shown, "the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that "it must succeed at final hearing" * * *.' " *Unicon Management Corp.* v. *Koppers Co.,* 366 F. 2d 199, 204–205 (C.A. 2). In particular, where a preliminary injunction is sought against public authority to restrain actions "whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the

rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus* v. *United States,* 321 U.S. 414, 440–441, and cases cited. On these standards petitioner and the *amicus* addressing the issue agree. Pet. Br. 40; Wilderness Society Br. 69–72. Since the court of appeals found no irreparable injury, it properly applied the more stringent test.

The real dispute under this heading in this case is whether an "irreparable injury" has been shown. Of course, if this project goes forward, there will be certain irreversible changes in topography, in accessibility, and, eventually, in use of the lands concerned. It does not follow, however, that the land will be rendered unaesthetic; it is clear that it will continue to be devoted to public, recreational use, albeit of a more extensive and somewhat different nature than petitioner prefers; and the court of appeals has found that all necessary steps are being taken to preserve conservational and environmental values. The question of "injury" is thus far less certain than it would be if, for example, the Secretaries had authorized a strip mine or had not provided to the extent they did for the protection of environmental values.

Moreover, under the "grave question" test which petitioner would have applied, any injury must be not only irreparable but also an injury to it, either in its organizational capacity or as representative of its members. We thus return again to the limitation which petitioner itself has introduced: the only interest claimed to be harmed is that of the public in lawful administration of public lands. The court of appeals concluded, properly in our view, that peti-

tioner had no standing to make that claim. It equally follows, we believe, that such an injury is not an injury suffered by petitioner or its members, as such. Indeed, petitioner seems to agree (Pet. Br. 42) that on the court of appeals' premise the "reasonable certainty" standard was properly applied.

Finally, even if the putative injury to the public is a sufficient basis for petitioner's claim of standing, it is necessary to consider not only that injury, but the possible injury suffered by the same public through delay of the project. In a competition between claimed public interests—in this case, competing notions of proper recreational development on public reserves—the fact that one of the alternatives has achieved administrative approval is enough to bring it within the rule of *Yakus, supra.* Even in a case between wholly private parties, one would have to consider where "the balance of injury" lies. *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43, 51; *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F. 2d 738, 740 (C.A. 2).

While the proposed changes in this case would be irreversible where they occur, they would affect barely one percent of federal forest and park lands in California, and the great bulk of the remainder remain available for petitioner's preferred uses; even within that one percent of land, steps have been taken to assure that any adverse effect will be controlled. The other side of the balance is reflected, not simply in delay in making the land available for the proposed recreational uses, but in a substantial inflation of expenses necessary to construct the project, of which this Court may surely take notice. There is no assur-

ance that a project once estimated to cost $35 million, or a road once estimated at $22 million, will cost as little once this litigation is complete. Consequently, there can be no assurance that it would then be built, even if the Secretaries' determination that the project is in the public interest and proper under governing statutes should be upheld.[16] The increased costs resulting from the delay are not readily, and have not been, compensated for by an injunction bond; and the inconvenience to the many members of the public who wish to use the new recreational facilities, should the Secretaries be upheld but the project not be built, is not "inconsiderable." Thus, even if petitioner has made out a claim of harm to it, it does not follow that the injunction should have issued. *Ohio Oil Co.* v. *Conway, supra; Yakus* v. *United States, supra.*

III.

THE MINERAL KING PROJECT DOES NOT EXCEED THE AUTHORITY TO MANAGE FEDERAL LANDS GRANTED THE SECRETARIES OF AGRICULTURE AND INTERIOR BY CONGRESS

If this Court agrees with our contention that petitioner has no standing to challenge the Secretaries' actions, no further inquiry is required. If, on the other hand, the Court concludes that the petitioner has standing, then we agree it should proceed to review the decision below on the merits of petitioner's

[16] This Court has recognized that the advantages which private parties may gain from delay in securing private interests is a reason for caution in permitting them as litigants to represent public interests. See *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U.S. 511, 519; *L. Singer & Sons* v. *Union Pac. R. Co., supra.*

claim, to the extent necessary to determine whether a preliminary injunction should issue. In this context, the appropriate inquiry, as we show above, is whether petitioner has shown a reasonable likelihood of success on the issues which it tendered. Petitioner's complaint properly limits these issues to questions of statutory and regulatory authority, and arbitrary and capricious action (A. 6–7, 8–9), and within those limits we do not contest their reviewability. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. We note, however, that the district court and court of appeals had before them only the five issues listed in Petitioner's Brief at pp. 42–43.[17] To the extent other issues are now pressed, notably the adequacy of the administrative record supporting the authorization of the access highway (see the Brief *Amicus Curiae* for the Environmental Defense Fund, pp. 49–51), they are raised too late for present consideration.

Consideration of these issues should take place with an awareness of the geographic and historical reali-

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[17] "[W]hether:

"1. 16 U.S.C. § 497 bars long-term use of more than 80 acres of national forest land for recreational purposes.

"2. 16 U.S.C. § 688 bars a use of the lands of the Sequoia National Game Refuge which would interfere with game animals and their habitat.

"3. 16 U.S.C. § 1 bars use of a National Park for a non-park purpose.

"4. The Secretary of the Interior's Rule for Road Building in National Parks, 34 Fed. Reg. 19, bars approval by the Secretary of a highway across Sequoia National Park absent the required public hearings.

"5. 16 U.S.C. § 45(c) bars construction of a transmission line in Sequoia National Park without Congressional authorization."

ties of Mineral King. In geography, it is, we fully agree, an integral part of the lands which make up Sequoia National Park. Historically, its exclusion from the Park was based on the presence of certain private uses which Congress decided not to disturb. Its designation as a national game refuge, petitioner and its supporters correctly relate, was intended to reflect its essential identity with the Park by assuring that it would not be opened up to non-recreational uses ordinarily permitted in national forests, but which might be destructive of Park values. The Mineral King development may be quite properly viewed as a development of this integral land mass, brought about through coordination by the two Secretaries who, essentially by historical accident, share authority over its two parts. Its proposed use as "a public park, or pleasure ground, for the benefit and enjoyment of the people," Sequoia National Park Act, 26 Stat. 478, 16 U.S.C. 41, serves the whole of the public lands involved.

These lands, of course, will remain public domain lands; the proposed Disney development would not, and could not, alter this. They are merely leased to a concessionaire for a specified use, which must conform with safeguards established and enforced by the respective Secretaries. Access to the lands—although not to the services which the concessionaire may offer—may not be made subject to the payment of a fee. And the amount of land actually occupied by the concessions is limited:

On 20 acres (now occupied by 36 summer houses) will be a reception center with service and mainte-

nance facilities; a railroad station with luggage handling facilities for transportation between the reception center and the village; a general store; a hospital; fire station; warehouse; commissary; gondola lift station with ski sale and rental shop; administrative facilities; and a five-acre underground parking lot.

A 25-acre area will contain hotels, apartments, and dormitories; a railroad station; a gondola lift station; two ice-skating rinks; swimming pools; a first-aid station; and an information center.

A 20-acre area will contain stables and corrals; railroad, water and sanitation facilities; married employees' housing; lift terminals; valley utility lines; sanitation drain fields; and a debris control drain.

These areas are all covered by the 30-year term permit which all agree the Secretary of Agriculture has authority to issue, for areas up to 80 acres in a national forest, for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation." 38 Stat. 1101, as amended, 16 U.S.C. 497. In addition, Disney is to receive a non-exclusive, revocable permit for less than 400 acres to be used for ski lifts and runs, certain of the sanitation facilities, and the like. These 400 acres are distributed over the Valley as a whole, and in that respect "affect" as much as 13,000 acres, just as walking trails through the Valley would; but 400 acres marks the limit of even the slight disturbances of the earth's surface contemplated under the revocable permit. Finally, the Secretary of the Interior has agreed to grant California a special use permit for the strip of land, "not

exceeding an average of 200 feet in width" (Appendix A, *infra*, p. 67) and without use of any other Park lands for any other construction purpose (*id.* at p. 75), necessary for the access road.

A. THE SECRETARY OF AGRICULTURE HAS AUTHORITY TO COMBINE FIXED TERM AND REVOCABLE USE PERMITS IN ORDER TO PERMIT THE OPERATIONS OF SKI RESORTS ON NATIONAL FOREST LANDS

Article IV, Section 3, of the Constitution gives Congress plenary power to dispose of the property of the United States. *Ruddy* v. *Rossi*, 248 U.S. 104, 106. The broad power of Congress over the public lands includes "the power to control their occupany and use * * *." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405. As this Court stated in *Gibson* v. *Chouteau*, 13 Wall. 92, 99:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. * * *

See also *United States* v. *San Francisco*, 310 U.S. 16, 29–30; *United States* v. *California*, 332 U.S. 19, 27; *Standard Oil Co. of California* v. *United States*, 107 F. 2d 402, 409 (C.A. 9), certiorari denied, 309 U.S. 654.

This power is delegable and Congress has delegated to the Secretary of Agriculture authority "to regulate [the] occupancy and use" of the national forests. Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551. The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C.

528, directs him to balance the many potential uses of national forest lands, "outdoor recreation, range, timber, watershed, wildlife and fish purposes," under a sweeping mandate that requires him to determine policies "that will best meet the needs of the American people." 74 Stat. 215, 16 U.S.C. 531(a).

The occupancy and use of national forest lands and resources, of course, has been by private persons, operating under concessions granted by the Secretary. One type of concession is specifically provided for by statute. Congress has authorized the Secretary to issue term permits of up to 30 years for forest areas of up to 80 acres for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation." 38 Stat. 1101, as amended, 16 U.S.C. 497.

A second type of concession arises under more general authority. The Secretary is granted broad regulatory powers under 30 Stat 35, 16 U.S.C. 551, including a specific mandate to "make such rules and regulations and establish such service as will insure the objects of such reservations [the public forests and national forests], namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." For more than a half century, dating back before the first grant of term permit authority, the Forest Service has regularly issued revocable permits based on Section 551 covering lands under its supervision. These permits have covered such special uses as residences, farms, airfields, fish hatcheries, camps, resorts, ski lifts and tows, schools, mills, stores, observatories, rifle ranges, dams and reservoirs. See Hear-

ings before the Subcommittee on Forests of the House Committee on Agriculture, 90th Cong. 1st Sess., Ser. J, pt. 2 (1967), at p. 2; Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, 80th Cong., 1st Sess. (1947), at pp. 2–6.

Even after Congress authorized term permits, the Forest Service continued frequently to employ revocable permits for a wide array of uses. This reflected a consistent Department policy of limiting a permittee's tenure by means of the revocable permit; term permits were, as a general rule, only sparingly issued. Moreover, the original statute authorized term permits for a maximum of five acres, so that revocable permits were sometimes needed to provide the permittee sufficient acreage for the desired use. It became apparent, however, that prospective permittees often could not obtain adequate financial assistance for their development plans where the proposed use, because of the acreage needed, required a revocable permit. Modification of Department policy to favor term permits was not enough to overcome this difficulty. Rather the need was for broader term permit authorization, to allow more acreage to be covered under that type of permit. Congress responded to the problem in 1956 by increasing the acreage limitation for term permits under 38 Stat. 1101, 16 U.S.C. 497 to the present level of eighty acres. Significantly, in recommending that this be done, the congressional committees explicitly recognized the agency's broad revocable permit powers:

> The Department of Agriculture now has adequate authority to issue revocable permits for

all purposes under the act of June 4, 1897 (16 U.S.C. 551).[18]

Congress has indicated its awareness of the Secretary's use of revocable permits on other occasions as well. Proposals to broaden the term permit authorization under 16 U.S.C. 497 have invariably included declarations that the Secretary could issue and was issuing revocable permits irrespective of the limits applicable to term permits, on the authority of "[t]he general laws relating to * * * national forests." S. Rept. No. 754, 72d Cong., 1st Sess. (1932), at p. 2; see also H. Rep. No. 805, 80th Cong., 1st Sess. (1947), at p. 2; S. Rep. No. 899, 80th Cong., 2d Sess. (1948), at p. 2; H. Rep. No. 1742, 83d Cong., 2d Sess. (1954), at p. 2; Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at pp. 2, 6. As recently as 1967, the Secretary advised

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[18] S. Rep. No. 2511, 84th Cong., 2d Sess. (1956), at p. 1; H. Rep. No. 2792, 84th Cong., 2d Sess. (1956), at p. 2.

The acreage increase amendment was finally enacted in 1956, more than twenty-five years after the Department first brought the problem to Congress' attention. During the intervening years, the Department reiterated to Congress its concern that the original term permit authorization under 38 Stat. 1101, 16 U.S.C. 497 imposed acreage limitations that were too restrictive. In every instance, however, this concern was couched in terms of the problems this caused permittees, by reason of their inability to obtain needed financial help; throughout the legislative deliberations concerning this matter, the Department repeatedly made clear its practice of issuing revocable permits under the broad authorization in 30 Stat. 35, 16 U.S.C. 551, without regard to the limitations imposed on term permits by 16 U.S.C. 497. See, *e.g.*, S. Rep. No. 754, 72nd Cong., 1st Sess. (1932); H. Rep. No. 805, 80th Cong., 1st Sess. (1947); S. Rep. No. 899, 80th Cong., 2d Sess. (1948); H. Rep. No. 1742, 83d Cong., 2d Sess. (1954); S. Rep. No. 2511, *supra;* H. Rep. No. 2792, *supra.*

Congress of the broad range of activities for which term and revocable permits had been issued, and of the extensive improvements that permittees under those permits had constructed. Hearings Before the Subcommittee on Forests of the House Committee on Agriculture, *supra,* at pp. 2–3. Forest Service officials gave the details: 63,000 term and revocable permits covering 80 different types of uses had been issued, of which approximately 53,000 involved permittee-built and owned improvements for such uses as airports, bathhouses, mills, observatories, rifle ranges, schools, stores, and ski-tows; the estimated value of these improvements exceeded $1 billion. *Id.* at p. 4. Officials explained that while the figures included both term permits and revocable permits, the latter were far more common: "Of all special-use permits, about 15 percent are term and 85 percent are terminable [revocable]." *Id.* at p. 13. There can, in sum, be no doubt that over the years Congress has known of and on numerous occasions has tacitly ratified the Secretary's extensive revocable permit practice.

Petitioner and its supporters argue that these two types of permits, term and revocable, cannot be combined—essentially, that conjoining them amounts to an evasion of the acreage limits provided in 38 Stat. 1101, 16 U.S.C. 497, which, they say, Congress meant to be absolute. But again, this has been a long-standing administrative practice, which Congress, though well aware of it, has never questioned. As early as 1932, the Secretary explained to Congress that "sup-

plemental terminable [revocable] permits" were being issued to a term-permit permittee, to provide him with sufficient total acreage under both types (term and revocable) "to permit of the proper development." S. Rep. No. 754, *supra,* at p. 2. This was reemphasized during congressional consideration in 1947 of the Secretary's request for expanded term-permit authority:

> [U]nder our present set-up, where the acreage exceeds 5 [the then-applicable limit of term-permit authority under 16 U.S.C. 497], we have to split the permit, give them [the permittees] one term permit under our existing authority for not more than 5 acres, and the rest of the undertaking has to be covered by the terminable type of permit, which is terminable at the discretion of the Chief of the Forest Service.

Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at p. 3; see also *id.* at p. 9.[19]

Congress evinced no intention to alter this practice when finally in 1956 it amended Section 497 to

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[19] The Department has combined the revocable permit with other types of term permits as well. A revocable permit often was used to supplement a term permit grant of a power transmission easement under 36 Stat. 1253, 16 U.S.C. 523. In 1952, Congress expanded the Secretary's powers under Section 523 by authorizing term permits for substantially wider easements. Act of May 27, 1952, 66 Stat. 95. At that time, Congress also was advised of the Department practice of issuing revocable permits solely on the authority of 16 U.S.C. 551, and the committees noted their concurrence. S. Rep. No. 1224, 82d Cong., 2d Sess. (1952), at pp. 1, 3–4; H. Rep. No. 1848, 82d Cong., 2d Sess. (1952), at pp. 2, 3–4.

broaden the term permit authorization. The Secretary had sought expanded term permit powers on numerous earlier occasions. In every instance, he had explained that this was needed because of the difficulties permittees under revocable permits had encountered in obtaining financial assistance to build large-scale improvements on acreage covered by a revocable permit; that type of permit, whether by itself or in combination with a term permit, did not provide the "certainty of tenure" required by financial institutions. See the authorities cited at note 18, *supra;* Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at pp. 2, 9. The same reason was reiterated in 1956. See S. Rep. No. 2511, *supra,* at p. 3; H. Rep. No. 2792, *supra,* at p. 3.

Department officials did indicate to Congress that increased term permit acreage authorization would diminish the need also to issue revocable permits in order to provide the total acreage necessary for particular developments. But there is no indication that either the Department or Congress thought the amendment would destroy the revocable permit practice. Instead, it was emphasized that this practice had existed for many years, without regard to the restrictions of Section 497. Moreover, the availability of both types of permit, for use separately or in combination, is still important to assure agency flexibility, so that, in accordance with long-standing policy, the term permit can be issued only where absolutely necessary, with the balance of the needed acreage being covered by a revocable permit. Finally, as we note above, in the course

of the amendment's enactment, the congressional committees specifically recognized that the Secretary had "adequate authority" for this practice under 16 U.S.C. 551. S. Rep. No. 2511, *supra,* at p. 1; H. Rep. No. 2792, *supra,* at p. 2. From all this, we think it is clear that no change in the Department's revocable permit powers resulted from the 1956 amendments.

Nor would any other conclusion be consistent with the just expectations of the many permittees who have relied on the Department's long-standing and consistent permit practice. In 1956, at the time of the amendment, numerous uses were authorized under combined term and revocable permits, frequently involving acreage in excess of the 5-acre pre-amendment limit and even the 80-acre limit sanctioned by the amendment.[20] This practice has continued to the present; there are now some 84 use authorizations under combined term and revocable permits for recreational developments alone, involving millions of dollars in

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[20] Department officials advise that recreational use authorizations combining term and revocable permits outstanding in 1956 included the following:

(1) Ducey's Bass Lake Lodge, in the Sierra National Forest, California—term permit for 5 acres, and revocable permit for 15 acres.

(2) Pinecrest Lodge, Inc., in the Stanislaus National Forest, California—term permit for 4.2 acres, and revocable permit for 8.32 acres.

(3) Dodge Ridge Corporation, in the Stanislaus National Forest, California—term permit for 5 acres, and revocable permit for 545 acres.

(4) Mammoth Mountain Ski Area, in the Inyo National Forest, California—term permit for 5 acres, and revocable permit for 1,000 acres.

permittee-owned improvements.[21] In many of these instances, as in the present case, the revocable permit is an essential supplement to the term permit, since without the additional acreage provided under the former the development would not be economically viable. Congress could hardly have intended to abolish the Secretary's authority to issue such revocable permits with the resulting unsettling effects on permittee investments without more explicit action on its part than was taken in connection with the 1956 amendment.

Petitioner and its supporters, apparently anticipating this problem, state that their argument will have no necessary effect on the many existing developments which combine term and revocable permits. On examination, this contention is questionable in the extreme. The determinative issue on this aspect of the case is whether the Secretary has the *authority* to issue to one permittee both a term permit and a revocable permit, where, in combination, they encompass more than 80 acres, the maximum area sanctioned for a term permit. If he lacks such authority, then it follows that all permits issued in violation of the statutory strictures

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[21] See Appendix B, *infra* pp. 80–81. The Department estimates the total value of improvements constructed and owned by permittees at these areas to be approximately $70 million. In addition to the listing in Appendix B, two ski resorts have been developed under only revocable permits. The Mount Snow area in the Green Mountain National Forest, Vermont, involves some 911 acres, on which the permittee has constructed improvements worth $2.9 million. Multorpor Ski Bowl at Mount Hood National Forest, Oregon, covers 640 acres and has permittee improvements worth more than $800,000.

are unauthorized, and as such might properly be found to be void and of no force and effect.[22]

This is especially so with respect to revocable permits that, under petitioner's view, have been improperly issued in combination with term permits; the Secretary would be under a virtual duty to revoke them at once, if they are unauthorized. Nor would existing concessionaires who have made large investments in reliance on a revocable permit be entitled to different treatment. We have difficulty understanding how the government could properly adopt the inconsistent position that these unauthorized "revocable" permits are wholly invalid, and yet some special equity entitles some or all present holders to continue their use. Compare *Utah Power & Light Co.* v. *United States, supra* 243 U.S. at 408–409; *United States* v. *California,* 332 U.S. 19, 39–40. Nor is it a distinction that in some existing developments no permanent facilities have been constructed outside the 80-acre term permit area, and that only such things as ski trails are in the revocable permit areas. Ski runs are as essential to the operation of a ski resort as its ski lifts and other permanent facilities, and the use of national forest lands for a commercial ski trail is not allowed without a permit. Since the total area occupied by all uses which require a permit and which are necessary for the project to function as an economic unit must be considered in determining if the statutory acreage restrictions are

[22] Since the issue is entirely one of statutory authority and legislative intent, it does not seem appropriate for the application of a non-retroactivity doctrine as suggested by *amicus* The Wilderness Society (Br. 101, n. 40).

exceeded, the legality of all present ski resort developments, and the status of the large investment they represent (see n. 21, *supra,* and Appendix B, *infra*), would be in question.

Finally, it is significant that revocable special use permits, such as the one proposed here, are revocable at will. By its terms, the proposed permit "may be terminated upon breach of any of the [numerous] conditions herein or at the discretion of the regional forester or the Chief, Forest Service" (see sample permit at App. 24, Clause 15). Thus, Department officials would have the *power* to revoke it at any time, notwithstanding that it would be closely tied to the proposed term permit. While the Department has been cautious in exercising its power to revoke permits of this type, it has done so where the public interest requires. See Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at p. 3; Hearings Before the Subcommittee on Forests of the House Committee on Agriculture, *supra,* at pp. 5, 9–15. Agency policy in this regard has been consistent, and assures that the less than 400 acres (not 13,000, as petitioner and its supporters suggest) to be covered by the revocable permit would remain under close governmental control.[23]

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[23] The procedures established by the Department for terminating permits apply to termination of revocable permits, as petitioner and its supporters point out. See 36 C.F.R. 251.1(b)(3). These provisions do not, however, make the revocable permit any less revocable. Section 2716.3–2 of the Forest Service Manual explicitly provides for discretionary termination of revocable permits. See *In re Sherman C. Smith*, 1 U.S.D.A. Board of Forest Appeals Decisions and Rulings under the

B. THE CONSTRUCTION OF RESORT FACILITIES ON LESS THAN 80 ACRES, AND OF SKI TRAILS AND LIFTS ON LESS THAN 400 ACRES, OF THE 15,000 ACRE SEQUOIA NATIONAL GAME REFUGE IS NOT INCONSISTENT WITH THE PURPOSES FOR WHICH THE GAME WAS CREATED

Measures to protect and preserve the broad expanse of public domain surrounding and integrally related to the Mineral King Valley date back many years. In 1890, Congress established Sequoia National Park, just north of the Valley. The Valley was first designated as national forest lands in 1893, as part of the Sierra Forest Reserve. It became part of Sequoia National Forest in the early 1900's. During the ensuing years proposals were made to include the Valley in an enlarged Sequoia National Park. Forest Service officials recommended against including within the Park mineral and merchantable timber lands, such as the Valley. See Hearings on H.R. 5006 Before the House Committee on Public Lands, 66th Cong., 2d Sess. (1920), at pp. 35–36, 38–39; Hearings on H.R. 9387 Before the House Committee on Public Lands, 69th Cong., 1st Sess. (1926), at pp. 57–58. When Congress finally enlarged the Park boundaries in 1926, it followed this recommendation and excluded the Valley, so that it remained national forest lands.

In doing so, however, Congress recognized that the Valley is closely related to the lands which make up

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Forest Service Appeals Regulations 433 (1967). As that decision emphasizes, a revocable permit is terminable "at pleasure," notwithstanding the procedures required to be followed in making the termination decision; those procedures are intended only to assure that the official's acts are "guided by reason," rather than mere "whim or caprice." *Id.* at 441–442.

the Park. While the "mineralized" character of the Valley's territory militated against including it directly within the Park, yet it was almost completely encircled by the Park's expanded boundaries and shared its topography and general nature. Because of this, it was urged that the Valley's management, and specifically its game conservation policies, should be consistent with that of the Park. *Ibid.* Congress responded by designating the Valley a part of the Sequoia National Game Refuge. 44 Stat. 821, as amended, 16 U.S.C. 688.

Thus, the legislative objective was to associate the Valley with the Park as regards administration and policies. There was no indication that the Valley was to be less accessible than the Park itself; there was no intent to make it virtually a wilderness area, as petitioner and its supporters would prefer.

Indeed, all indications are to the contrary. Forest Service officials informed Congress that the Valley should continue to be available for the uses permitted on national forest lands even after its designation as a game refuge (Hearings on H.R. 9387 Before the House Committee on Public Lands, *supra,* at p. 58). Congress made explicit provision for this in 16 U.S.C. 688, thus evincing its determination that the Valley would be subject to the broad and extensive use provisions generally applicable to national forests.

The statute does direct that national forest uses in the Valley shall be consistent with the purpose for which it was designated a game refuge—"to protect from trespass the public lands of the United States and the game animals which may be thereon." 16 U.S.C. 688. But recreation facilities such as here

planned are not inconsistent with this purpose. In this regard, we think petitioner places undue emphasis on the extent of physical disturbance of the land—though even on this basis petitioner's objections are wide of the mark, since in fact only some 3 percent (approximately 465 acres) of the Valley's total area (15,000 acres) would be even slightly altered. More significant, in our view, is the extent of the planned human presence and whether that is at odds with the statutory scheme. While petitioner's concern might properly assume greater importance if the Valley were designed to be a wilderness area, that is not this case; the mere designation of public lands as a game refuge, as here, has never been thought to necessitate the exclusion from such areas of people or of facilities to provide for their recreation and enjoyment. In fact, the Secretary has consistently authorized private concessionaires to construct recreational facilities, costing substantial amounts, on game refuge lands.[24]

Moreover, the use restrictions applicable to forest lands because of their designation as game refuges are no greater than those applicable to national park lands generally, and to Sequoia National Park lands in particular. Compare 26 Stat. 478, 16 U.S.C. 41; 26 Stat. 478, as amended, 43; 44 Stat. 820, 45b; and 41 Stat. 731, 16 U.S.C.

[24] Recreation facilities have been authorized in George Washington National Forest, Virginia; Ocala National Forest, Florida; Ozark National Game Refuge, Arkansas; Ouchita National Wildlife Preserve and Game Refuge, Arkansas; Kisatchie Game Refuge, Louisiana; and Pisgah Game Refuge, North Carolina.

with 44 Stat. 821, 16 U.S.C. 688 and 48 Stat. 400, 16 U.S.C. 694.[25] It follows that any use that would be proper on park lands would be proper in the Valley. And there can be little doubt that the proposed development fully accords with general national park purposes. National parks, after all, are for the public to enjoy; to this end, the parks should be developed to encourage and provide for their use by as many members of the public as is reasonably practicable, so long as that does not impair enjoyment of park lands by future generations. Indeed, Congress has, accordingly, expressly approved the providing of "public accommodations, facilities, and services" on national park lands, without limit as to area, where, as here, the proposed project is carefully planned and supervised. 79 Stat. 969, 16 U.S.C. 20, 20a. In accordance with this statutory policy, six ski and recreation areas currently have been developed by private concessionaires on sizable areas of national park lands.[26]

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[25] While the Wilderness Society, et al. emphasize 48 Stat. 400, 16 U.S.C. 694 (Br. 87), it is doubtful that that provision applies here, in view of 44 Stat. 821, as amended, 16 U.S.C. 688 which specifically deals with the Sequoia National Game Refuge (of which the Valley is a part).

[26] These developments are located in seven different national parks. In each instance, the recreational facilities cover large areas of park land, and include ski tows, lifts, and runs. The parks and the estimated value of permanent concessionaire improvements are as follows: (1) Mount Rainier National Park, Washington: $76,901; (2) Sequoia and Kings National Parks, California: $1,393,999; (3) Yosemite National Park, California: $14,831,884; (4) Olympic National Park, Washington: $651,089; (5) Lassen Volcanic National Park, California: $579,494; and (6) Rocky Mountain National Park, Colorado: $186,670.

C. THE CONSTRUCTION OF AN ACCESS ROAD THROUGH THE SEQUOIA NATIONAL PARK, CAREFULLY CONTROLLED FOR ITS IMPACT ON THE PARK AND WITH PROVISION FOR USES WITHIN THE PARK, IS WITHIN THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO PERMIT

Congress has delegated to the Secretary of the Interior "plenary authority over the administration of [the] public lands." *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336, 337–338; *Boesche* v. *Udall*, 373 U.S. 472, 476–477 n. 6. Supplementary to the Secretary's general power, Congress has directed him to "promote and regulate the use of the * * * national parks," to "grant privileges, leases, and permits for the use of land" in the parks, to construct roads in national parks, and to cooperate with the Secretary of Agriculture in administering contiguous national forests. Organic Act of the National Park Service of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1, 2–4, 8. Acting under this authority, the Secretary proposes to authorize the State of California to construct an access road to Mineral King Valley, replacing the existing substandard road, subject to stringent conditions and supervision for the protection and enhancement of the Park.

A motivating factor in construction of this road is to permit easier access to Mineral King, although ample provisions are also made for enhancing use of the Park itself.[27] Nonetheless, we believe that peti-

[27] The Secretary is specifically authorized (43 Stat. 90, 16 U.S.C. 8) "to construct, reconstruct, and improve roads * * * in the national parks." This broad power, petitioner and its supporters concede, permits all road construction that is in fact for "park purposes." To a significant extent, the new road would directly

tioner and its supporters distort this case when they state the question broadly as being whether the Secretary of the Interior can authorize a freeway through a National Park, to serve commercial facilities. For their statement overlooks several salient factors, which considerably narrow the case and make the Secretary's authority clear: the road replaces an existing access road; the rights given are explicitly made not subject to expansion, and are subject to extraordinary safeguards which assure against destruction of park values; the road gives access only to other public lands also devoted to public recreational use; the history of the particular area shows that those other public lands and their use were intended by Congress to be integral with the Park. In any non-technical sense, it is clear that this road serves *only* a Park purpose. Whatever the Secretary's authority to facilitate access through National Parks to cities, factories or gravel pits, on the narrow question of his authority to permit this road the answer is clear.

An existing access road crosses the Park to the Mineral King Valley, along the same general route that the new road would follow. The present road crosses slightly more than 9 miles of Park land and provides the only surface access to the Valley. It is very narrow and substandard and includes a number of sharp switchbacks; most of its surface is oiled dirt

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serve the needs of the Park itself. It would enhance the public's opportunity to enjoy the Park, through improved access to it; it would also include construction of scenic overlooks and roadside parking areas, and involves interchanges and connections with other Park roads (Appendix A, *infra*, Clauses 20, 35).

with several short sections consisting of only a graded roadbed. During part of each winter the road is closed at higher elevations. Average daily traffic on the road now is estimated at 95 vehicles; it plainly is inadequate to handle a large number of vehicles or to accommodate travel throughout the year. (App. 28, 60, 144.)

The Secretary's proposed authorization of the new road comports fully with his broad responsibilities and with the particular history and development of this area. Of course, the Secretary's primary duties relate to the national parks and other areas under his direct supervision. But Congress, in delegating responsibility over various portions of the public domain to different federal officials, was not unmindful that coordination between these officials is essential. Accordingly, it is expressly provided that the Secretaries of Agriculture and Interior are to cooperate in the supervision, management and control of contiguous lands under their respective control. See 39 Stat. 535, as amended, 16 U.S.C. 2; compare 46 Stat. 1054, 16 U.S.C. 8c. The new road, to be built along substantially the same route as the old one and to provide greatly improved access to contiguous national forest lands in the Valley, all subject to governmental control to assure full and adequate protection of environmental values, is no more than a fulfillment of this obligation.[28]

Certainly this is the situation in the circumstances

[28] The Secretary has authorized roads through national park lands to facilitate access to adjoining national forest lands on other occasions as well. Examples are: (1) Pacific Creek Road, Ramshorn Ranch Road, and Kelly Road, through Grand Teton National Park to Teton National Forest; and (2) West Pros-

here, in light of the long-standing association of Park and Valley lands and their closely coordinated administration (see *supra*, pp. 51–52). The Valley has always been integrally related to the Park in terms of topography and nature. By designating the Valley a game refuge, Congress explicitly concurred in the judgment that the Park and the Valley should be administered as a consistent whole. Indeed, during Congressional consideration of proposals to enlarge the Park, it was specifically noted that the "Mineral King Valley is a natural course for roads or trails" to the southeastern section of the expanded Park. Hearings on H.R. 5006 Before the House Committee on Public Lands, *supra*, at p. 74. Since the expansion of the Park, both the Park and the Valley have been devoted to the same basic purpose, to provide outdoors enjoyment and recreation for the public, and the Mineral King Valley road has served as an essential part of the overall road network for the region. In this setting, then, the new road serves only Park purposes, in the broader sense required by the history of this particular area, since it will provide better and greater access to the entire area.

Finally, the proposed new road would not pose any real dangers to the park lands. After all, a road through the Park already exists, and the proposed road would be built along or substantially parallel to the present roadbed as a replacement of the exist-

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pect Peak Lookout Road, through Lassen National Park to Lassen National Forest.

The West Prospect Peak Lookout Road goes through the Park to a fire lookout in the Forest. It has no connection with any other Park roads and does not serve any area within the Park.

ing road. At each step, extraordinary safeguards to provide against destruction of Park values have been, or would be, taken. Professor Hartesveldt's ecological study reported that construction of the proposed road would not damage the Park's sequoias, provided stated precautions were taken; only after receiving this assurance did the Secretary agree to authorize California to build the new road, specifically subject to the Hartesveldt recommendations (Appendix A, *infra,* Clause 26). More generally, the permit requires that "[d]esign and construction must afford * * * protection" for environmental features (Clause 16). And all federal and state standards for controlling and eliminating air and water pollution must be met (Clause 34). The state has agreed that if the new road is not adequate to handle the increased traffic, it will not seek any further improvement of the road through the Park, but instead will provide for such traffic by other means (Clause 37). All phases of the design and construction of the road are subject to departmental supervision and control (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35). In these circumstances, construction of the new road would pose no significant risk of harm to the Park or park values.

Nor would the planned recreation facilities that occasioned the construction of the new road be inconsistent with the public purposes served by both Park and Valley. Such facilities have long been permitted in both national parks and national forests (including forest lands designated as game refuges, like the Valley). See *supra,* pp. 52–54.

The fact that the Valley would be developed by a private concessionaire, rather than the Forest Service itself, is immaterial, since the concessionaire would be operating under a permit issued by the Service to implement a developmental plan approved by it. The only real question concerns accessibility to the Valley and whether the Secretary would overreach his authority in allowing construction on Park lands of a replacement road that would improve that accessibility. Improved accessibility does not conflict either with the Valley's status as forest and game refuge lands or with the broader purposes for which the Park and the Valley have been jointly set aside and administered. As we pointed out above (see *supra*, pp. 52–54), there is no indication that Congress intended to restrict in any way public enjoyment of, or access to, these areas; thus, providing for full use of them by the public is an entirely proper objective. The new road would further this objective.

D. THE PROVISION FOR A SUBMERGED ELECTRIC TRANSMISSION LINE, WITHIN THE ROAD PRISM, TO CARRY ELECTRIC CURRENT TO MINERAL KING IS ALSO PROPER

Although the issue was not included in the allegations in its complaint, Sierra Club's memorandum in support of summary judgment challenged the Secretary of the Interior's power to authorize a transmission line across Sequoia National Park. The Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 79, authorizes the Secretary to grant revocable rights-of-way "through" Sequoia National Park "for electrical plants, poles, and lines for the generation and distribu-

tion of electrical power, and for telephone and telegraph purposes * * *." See also 31 Stat. 790, as amended, 43 U.S.C. 959. Ten years later, in 1911, Congress delegated to the head of each department having jurisdiction over public lands the authority to grant *term* rights-of-way "over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *." Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5.

Despite this seemingly clear-cut authorization, petitioner and its supporters argue that only Congress can authorize the transmission line here because of the following proviso in 44 Stat. 820, 16 U.S.C. 45c, which applies specifically to Sequoia National Park:

> * * * *Provided* That no permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The background of the proviso, we believe, fully answers this contention, and shows that the proviso was aimed only at excluding from the park large hydroelectric power projects, not limited transmission facilities such as that planned here.

The proviso to Section 45c followed enactment in 1921 of a provision for direct congressional control over the licensing powers of the newly created Federal Power Commission with respect to designated public

lands (Act of March 3, 1921, 41 Stat. 1353, as amended, 16 U.S.C. 797a):

> * * * [N]o permit, license, lease, or authorization for dams, conduits, reservoirs, powerhouses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

This provision had but one purpose—to withdraw from the Power Commission authority that inadvertently had been delegated to it, to permit, without express congressional approval, development of the water power located within national parks and monuments. See 60 Cong. Rec. 403–404 (1920); *id.* at 2002, 3789, 4204 (1921).

In 1926, Congress expanded Sequoia National Park to include large areas of the surrounding High Sierra country. In part, at least, this resulted from increasing public concern that the areas involved might be subjected to development for hydroelectric power purposes, with the accompanying damming of rivers and flooding of valleys; indeed, a number of proposals for such development in this general area had been made in earlier years. Hearings on H.R. 7452 before the House Committee on Public Lands, 67th Cong., 2d Sess. (1921), at pp. 7–8, 12, 18. See H. Rep. No. 583, 67th Cong., 2d Sess. (1922), at pp. 2–3. Interests favoring such development opposed original plans for expanding the Park, but dropped their opposition when the lands on which projects of that type were

most likely to be located were excluded. S. Rep. No. 1080, 69th Cong., 1st Sess. (1926), at p. 2; H. Rep. No. 902, 69th Cong., 1st Sess. (1926), at p. 2.

The proscriptive language of the 1921 Act limiting the Power Commission's license authority with respect to park lands was copied verbatim into the 1926 statute expanding Sequoia National Park, and, as codified, became the proviso to Section 45c. A suggestion that this be done was first made in connection with an earlier proposal to enlarge the Park, at about the time the 1921 Act was passed; it was explained that a restriction like that in the 1921 Act should be included in the Park expansion statute for the same reason it was in the Act, to "prohibit the development of hydroelectric power in the proposed enlarged park except by special act of Congress." H. Rep. No. 583, *supra,* at p. 2. See also Hearings on H.R. 7452 Before the House Committee on Public Lands, *supra,* at pp. 8–15.

The focus throughout the legislative deliberations dealing with these matters was on preventing large-scale operations aimed at exploiting the sources of water power located in national parks and monuments. The inclusion in these statutory provisions of a reference to "transmission lines" should be read in this context. Such lines are prohibited, we submit, only if they are part of a hydroelectric power complex to be built on park land. There is no indication that Congress intended in effect to repeal its earlier authorization under the 1901 and 1911 Acts, empowering the Secretary to grant rights-of-way and permits for electric power lines on public lands. Accordingly, the court

of appeals properly concluded that the Section 45c proviso does not bar the power line contemplated here.

It is now suggested, however, that the issue under these statutes is whether the line should be denominated "transmission" or "distribution" in a technical sense.[29] But, even assuming that this is the proper standard and that viable issues of fact relating to it have been raised, that question would not warrant the issuance of a preliminary injunction in this case. As in the matter of the road, this question should be viewed in the perspective of the precise use being authorized. There is here no massive transmission facility carrying power to a distant city. Again, in the broad sense, all the power is to serve the Park—that is, the Mineral King Valley which was excluded from the Park for reasons irrevelant to the matter at hand, and which Congress clearly sought to associate, for most purposes, to the Park by its designation as a game refuge. It is conceded that congressional approval is not required for lines that would transmit power into the Park and distribute that power within it (Pet. Br. 80; The Wilderness Society Br. 120–122); as in the case of the road, this line should be treated as such a line. And the requirement that it be buried within the road right-of-way gives full assurance against any independent harm to the Park or park values.

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[29] See The Wilderness Society Br. 122. The suggestion that the line will, in fact, be carrying a higher volume of power than the record shows (69 kilowatts, rather than 66 kilowatts) is gratuitous and unsupported.

E. THE SECRETARY OF THE INTERIOR EFFECTIVELY REVOKED A REGULATION ADOPTED BY HIS PREDECESSOR

On January 29, 1969, the Secretary of the Interior adopted and published regulations governing the building of roads in National Parks. 34 Fed. Reg. 1405. Those regulations were adopted pursuant to his authority under the National Park Service Act, 39 Stat. 535, 16 U.S.C. 3, to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks * * *." Their adoption was not preceded by a notice of proposed rule-making, a statement of the time, place, or nature of public rule-making proceedings, or an opportunity for the public to participate in the proposed rule-making. Notwithstanding these departures from the ordinary requirements of rule-making under the Administrative Procedure Act, 5 U.S.C. 553, the new rules were valid. Because they concerned the management of public property by the Department of the Interior, the rules were exempt from those requirements. 5 U.S.C. 553(a)(2); *Duesing* v. *Udall,* 350 F. 2d 748, 752 n. 4 (C.A.D.C.), certiorari denied, 383 U.S. 912; *McNeil* v. *Seaton,* 281 F. 2d 931, 936 (C.A.D.C.).

Had these rules remained in effect, certain hearings which have not yet been held in this case would have been required before California could be authorized to build the access road. However, on April 21, 1969, the Secretary of the Interior revoked the new procedures. This was done, again, without compliance with the ordinary procedural requirements of the Administra-

tive Procedure Act. Petitioner contends (Br. 74–78) that while the adoption of the rule in this mode was effective, its revocation was not. It proposes no basis for that distinction. We believe the contention answers itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.
WM. TERRY BRAY,
Assistant to the Solicitor General.
EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

AUGUST 1971.

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

(Permit No. 4:102–067; expires _____; previous permit No. none.)

Special Use Permit

Sequoia National Park

Director, Department of Public Works, of State of California is hereby authorized during the period from _____, 19__, to _____, 19__, to use the following-described land in the above-named area:

A strip of land sufficiently wide for construction of a two-lane highway not exceeding an average of 200 feet in width, approximately 9.2 miles long, in township 17 South, Range 30 East, Mount Diablo base line and meridian; through Sections 18, 19, 20, 17, 21, 16, 15, 14, 11 and 12 progressing from west to east and containing 220 acres more or less; See Attachment "B"; for the purpose of construction and maintenance of a two-lane limited access highway to Mineral King; subject to the conditions on the reverse hereof and attached pages and to the payment to the Government of the United States of the sum of "waived" dollars ($____), in advance _____ (Monthly, semi-annually, etc.), or as follows: payment to be made to the Superintendent by Express or Postal Money Order, Certified Check, or Draft payable to the National Park Service, or Cash.

Issued at _____ this ____ day of _____, 19__.

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied, therein.

TWO WITNESSES TO SIGNATURES	PERMITTEE[1] (Signature)
NAME:	NAME:
ADDRESS:	ADDRESS:
NAME:	NAME:
ADDRESS:	ADDRESS:

APPROVED: (*If approval is required by higher authority*)

NAME:	TITLE: Regional Director.	DATE: _____, 1969

[1] Sign name or names as written in body of permit; for copartnership, permittees should sign as "members of firm"; for corporation, the officer authorized to execute contracts, etc., should sign, with title, the sufficiency of such signature being attested by the Secretary, with corporate seal, in lieu of witnesses.

Conditions of This Permit

1. *Regulations.*—The permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with the regulations of the Secretary of the Interior, or other authorized officer of the Government, governing the area.

2. *Definition.*—The term "Director, National Park Service" as used herein shall include the appropriate Regional Director or Superintendent as the representative of the Director.

3. *Rights of the Director.*—Use by the permittee of the land covered hereby is subject to the right of the Director, National Park Service, to establish trails, roads, and other improvements and betterments over, upon, or through said permises, and further to the use by travelers and others of such roads and trails as well as of those already existing. If it is necessary to exercise such right, every effort will be made by the National Park Service to refrain from unduly interfer-

ing or preventing use of the land by the permittee for the purpose intended under this permit.

4. *Nondiscrimination.*—See attachment A.

5. *Damages.*—The permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the permittee is authorized to make of the land described in this permit.

6. *Construction.*—No building or other structure shall be erected under this permit except upon prior approval of plans and specifications by the Director, National Park Service, and the premises and all appurtenances thereto shall be kept in a safe, sanitary, and sightly condition.

7. *Removal of structures and improvements.*—Upon the expiration of this permit by limitation of time or its termination for any reason prior to its expiration date, the permittee, if all charges due the Government hereunder have been paid, shall remove within such reasonable period as is determined by the Superintendent, but not to exceed 90 days unless otherwise stipulated in this permit, all structures and improvements placed on the premises by him, and shall restore the site to its former condition under the direction of the Superintendent. If the permittee fails to remove all such structures and improvements within the aforesaid period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

8. *Water rights.*—The United States reserves the rights to perfect title to all rights for water which may be developed or used in connection with this permit and shall furnish water to the permittee, when available, at reasonable rates to be approved by the Director, National Park Service. Should such water

service be unavailable or inadequate, the permittee may, with prior approval of the Director, provide the same at his own expense, subject to such special requirements as may be prescribed.

9. *Disposal of refuse.*—The permittee shall dispose of brush and other refuse as required by the Superintendent.

10. *Timber cutting.*—No timber may be cut or destroyed without first obtaining a permit therefor from the Director, National Park Service.

11. *Fire prevention and suppression.*—The permittee and his employees shall take all reasonable precautions to prevent forest, brush, grass, and structural fires and also shall assist the Superintendent in extinguishing such fires in the vicinity of any tract which may be used hereunder.

12. *Soil erosion.*—The permittee shall take adequate measures, as directed and approved by the Superintendent to restrict and prevent soil erosion on the lands covered hereby and shall so utilize such lands as not to contribute to erosion on adjoining lands.

13. *Benefit.*—Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this permit or derive, either directly or indirectly, any pecuniary benefit to arise therefrom: *Provided however,* That nothing herein contained shall be construed to extend to any incorporated company, if the permit be for the benefit of such corporation.

14. *Assignment.*—This permit may not be transferred or assigned without the consent of the Director, National Park Service, in writing.

15. *Revocation.*—This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service.

16. The maximum design speed will be 50 miles per

hour. The minimum curve radius and maximum superelevation to conform with Table III–6, page 133 of the American Association of State Highway's Officials' *A Policy on Geometric Design of Rural Highway,* published in 1954, reprinted in 1961; and the maximum grades of 8 percent are authorized with the understanding these criteria are not inflexible. Lesser design speed is authorized where necessary to protect environmental features. Design and construction must afford this protection.

17. The roadway section shall consist of a 24-foot driving surface, 6-foot paved shoulders, and 6-foot paved ditches in cut sections. Shoulders and paved ditch sections shall be chipped for color and texture.

18. The use of bridges for crossing major drainages and at other locations where ecological considerations are of prime importance shall be exploited to the fullest extent. The use of walls, cribbing, half-viaducts, tunnels, and other structural elements shall be given full consideration in order to reduce the height of cuts and fills and shall be used wherever feasible.

19. Climbing passing lanes will be permitted but will be carefully located to reduce scarring.

20. Vistas, overlooks, or roadside parking areas shall be located and constructed as mutually agreed by the State and the Service. Development and operation of water supplies shall be by the State.

21. Fencing of the highway will not be required within the park boundary except as may be specified by the Service after review of final highway plans.

22. Review of Plans and Specifications:

a. The Service will be provided an opportunity to work closely with the State during the preparation of both the preliminary and final plans and specifications. A Service representative will be assigned to the

Mineral King project to coordinate design and construction phases of the project with the State.

b. The final plans and specifications will be presented to the Service for approval and the contract shall not be awarded until such approval is given. Changes in the plans and specifications will be approved by the Service before being placed in effect, provided, however, that the Service may exempt from its approval any changes of a class or type as to which it deems its approval to be unnecessary. The Service shall notify the State of its concurrence or nonconcurrence with any such changed proposals within five calendar days after the State has presented the proposed changes to Service's project representative, or such change shall be deemed to be concurred in by the Service.

23. State shall:

a. Protect and preserve soil and vegetative cover and scenic and esthetic values on park lands outside of construction limits. Construction limits will be that area from top of cut slope to toe of fill slope plus 5 feet on either side, or additional width as required for structures, drainage ditches, or other appurtenances as shown on the approved plans.

b. Provide for the prevention and control of soil erosion on lands adjacent to the roadway that might be affected by the construction, operation, or maintenance of the highway. Vegetate and keep vegetated with mutually approved species all earth cut or fill slopes feasible for revegetation and other areas on which ground cover is destroyed. The State shall also maintain all terraces, water-bars, leadoff ditches, or other preventive works that may be required to accomplish this objective. The provision shall also apply

to slopes that are reshaped following slides which occur during or after construction.

24. Before clearing operations or construction of the highway is started the State will:

a. Prepare, in cooperation with the Service, a fire protection plan which will set forth in detail the fire prevention, presuppression, and suppression measures which will be taken by the State, its employees, contractors, and subcontractors, and their employees in all operations during the construction stage. The fire plan shall be made available to all bidders prior to letting contract and the State shall cause its contractors to comply with all provisions of the fire plan and all burning permits issued for disposal of flammable materials.

b. Prepare, in cooperation with the Service a clearing plan which will set forth in detail the procedures and standards which will apply to (1) all clearing and disposal of merchantable timber, stumps, and young growth in the construction limits and (2) debris disposal, including debris removal from all streams. Such plan shall include provision for payment to the United States by the State or its contractors for all merchantable timber cut, used, or destroyed in the construction of the highway on lands of the United States. Payment for merchantable timber will be at appraised value as determined by the Service: Provided, that the Service may dispose of the merchantable timber to other than the State or its contractors at no stumpage cost to the State or its contractors.

25. The State shall erect appropriate signs acceptable to the Service at each end of the highway project notifying prospective users of the road of construction activities planned or underway. The State shall provide such other signs as the Service deems necessary

for permanent traffic control, for the safety and protection of visitors and wildlife, and for directional and interpretive purposes. Advertising signs shall not be permitted along the roadway.

The work incident to the construction of the Mineral King highway and all work incident to maintenance of the highway prism within the construction limits shall be done by the State without cost to the Service.

26. All road surveys, construction and maintenance activities are to be carried out by the State in such manner as to prevent damage to Sequoia trees and in accord with the findings and recommendations of the detailed study and report, Contract No. 6177–H, made by Dr. Richard J. Hartesveldt with the California Division of Highways (December 19, 1966).

27. Use of Chemicals:

a. The use of chemicals for control of growth of vegetation will be permitted only after specific written approval has been given by the Service. Application for such approval shall be in writing and shall specify the time, method, chemical, and the exact areas to be chemically treated.

b. The use of chemicals for ice control will be permitted only after specific written approval has been given by the Service on a seasonal basis. Application for such approval shall be in writing and shall specify the method and chemical to be used.

28. Waste materials resulting from slides during and after construction as well as surplus materials shall be disposed of at locations approved by the Service. A plan showing the method and location of disposal shall be submitted at the time contract plans are submitted for approval.

29. Mechanized equipment shall remain within the construction limits at all times during construction.

No construction camps will be permitted within Sequoia National Park. Where additional work areas or construction access roads are required within the park, such as at bridge sites, specific areas shall be delineated and approved by the Service. No maintenance buildings or other structures, storage yards, permanent stockpile locations, or borrow pits shall be located within Sequoia National Park.

30. Since the Mineral King Highway is to be a limited access route, the State, during the process of acquiring private lands for the road, will acquire limited access rights thereto within the boundaries of Sequoia National Park.

31. The State agrees that any utilities authorized by or pursuant to law for development and use of the Mineral King Highway and Basin may be placed underground and within the road prism.

32. Subsequent to completion of construction provided for in this permit, or at such time as mutually agreed by the National Park Service and the State, sections or all of the existing road will be abandoned and obliterated. It is the intent that such treatment be limited to scarifying and/or earth blanketing the existing roadway, removal of drainage structures, and berms, opening drainage channels, seeding and other miscellaneous work of this magnitude. It is not the intent to remove existing embankments and place them in existing cuts or to perform other work of this magnitude. It is recognized that additional measures may have to be taken where the existing road is in close proximity of the new road. The State Highway Department will initiate action to transfer the abandoned roadway to the United States.

33. The Service shall not be responsible for any injury to persons or damage to property resulting from

the use and occupancy of federally owned lands by the State, its representatives, employees, or contractors. The State shall save and hold the United States harmless from all claims which might result from any work connected with such occupancy and use, and from any claims which may result from visitor use of the highway and any other areas assigned under this agreement.

34. The State agrees to comply with all standards set forth by the Service, the Federal Water Pollution Control Administration, and other responsible Federal and State agencies for the control and elimination of air and water pollution.

35. The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon.

36. The enforcement of traffic regulations, investigation of accidents and complaints, rendering assistance to motorists, and other traffic control measures shall be the responsibility of the appropriate agency of the State. Since Sequoia National Park is subject to the legislative jurisdiction of the United States, the exercise of such authority on that section of the road within the park may require special arrangements or legislation.

37. As a condition for granting this permit, Permittee agrees that should it ever be necessary in the future to provide for increased visitor capacity in Mineral King, an alternate means of access to Mineral King shall be provided which does not involve access through the Park; or in the alternative, such excess capacity shall be accommodated through mechanical means in lieu of any further improvement of road access.

ATTACHMENT A

CONTINUATION OF CONDITIONS OF THIS PERMIT (FORM 10–114)

The following provisions constitute Condition 4 in accordance with Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967.

Nondiscrimination.—If use of the resource covered by the permit will involve the employment by the permittee of a person or persons, the permittee agrees as follows:

(1) The Permittee will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or temination; rates of pay or other forms of compensation; and selection for training, including appenticeship. The Permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Superintendent setting forth the provisions of this nondiscrimination clause.

(2) The Permittee will, in all solicitations or advertisements for employees placed by or on behalf of the Permittee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Permittee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or under-

standing, a notice, to be provided by the Superintendent, advising the labor union or workers' representative of the Permittee's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Permittee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Permittee will furnish all information and reports required by Executive Oder No. 11246 of September 24, 1965, as amended, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the Superintendent and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Permittee's noncompliance with the nondiscrimination clauses of this permit or with any of such rules, regulations, or orders, this permit may be cancelled, terminated or suspended in whole or in part and the Permittee may be declared ineligible for further Government contracts or permits in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Permittee will include the provisions of Paragraphs (1) through (7) in every subcontract of purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontract or purchase order as the Superintendent may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the Permittee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Superintendent, the Permittee may request the United States to enter into such litigation to protect the interests of the United States.

Permit No. _____
Permittee _____
Area _____

Revised 5–21–68.

APPENDIX B

U.S. Forest Service

Tabulation of term-revocable permits, May 5, 1969

Area name or permittee	Permit acreage		
	Term	Revocable	Total
Arapahoe Basin	80	1,220	1,300
Aspen	80	89	169
Aspen Highlands	80	479	559
Breckenridge	80	1,684	1,764
Buttermilk	80	454	534
Copper Hill	30	890	920
Crested Butte	50	1,670	1,720
Geneva Basin	35	365	400
Lake Eldora	20	460	480
Loveland Valley and Loveland Basin	80	2,280	2,360
Monarch	16	1,609	1,625
Mt. Werner	80	240	320
Pikes Peak	5	250	255
Powderhorn	25	475	500
Purgatory	20	1,480	1,500
Snowmass	80	6,218	6,298
Sunlight	80	2,001	2,081
Vail	80	6,390	6,470
Winter Park	80	952	1,032
Wolf Creek	80	382	462
Stewart Slope	40	40	80
Antelope Butte	80	87	167
Meadowlark	75	76	151
Sleeping Giant	15	65	80
Carson—Taos Ski Valley	4.8	40	44.8
Coconino—Arnal Corporation	20	757	777
Santa Fe—Lake Peak Corporation, Santa Fe Ski Basin	80	505	585
Fred's Mountain	[1] 80	600	
Alta-Snowbird	55.62	1,116	1,171.62
Bogus Basin	72	788	860
Beaver Mountain	8.4	391.6	400.0
Snow Basin	46.76	701	747.76
Skyline	16	388	404
Brian Head	20	13.72	33.72
Brundage Mountain	34.7	945	979.7
Magic Mountain	6.4	60	66.4
Snow King Mountain Teton Pass	18.25	6,710	6,728.25
Jackson Hole	56.2	585	641.2
Heavenly Valley	40	2,000	2,040
Lee Canyon	40	432.56	472.56
Heavenly Valley	80	1,543.77	1,623.77
Sierra Ski Ranch	80	694.00	777.00
June Lake Development Co	66	1,540.00	1,606.00
Lakeshore Resort	5	?	?
Mammoth Mtn. Ski Area	70.5	1,950.00	2,020.50
Snow Valley, Inc	80	700.00	780.00
Snow Summit Ski Cor	30	590.00	620.00

See footnote at end of table.

Area name or permittee	Permit acreage		
	Term	Revocable	Total
Moonridge Mtn. Estates, Inc.	47.6	658.80	706.40
Weirick and Company	20	750.00	770.00
Dodge Ridge Cor.	8.52	405.58	414.00
Sugar Bowl Cor.	2.5	80.00	82.50
Auburn Ski Club	80	43.00	123.00
Alpine Meadows of Tahoe	80	600.00	680.00
Mt. Reba	80	1,600.00	1,680.00
Pinecrest Lodge	6.31	8.32	14.63
Merced, County of, Organization Camp	5	20.00	25.00
Alpental	29	700	729
Arbuckle Mountain	73	330	403
Crystal Mountain	80	3,700	3,780
Hoodoo Ski Bowl	62	267	329
Hyak	30	290	320
Mission Ridge	80	1,280	1,360
Mt. Ashland	28.6	183	211.6
Mt. Hood Meadows	80	3,100	3,180
Snoqualimie Summit	70	150	220
Spout Springs	69	121	190
Stevens Pass	80	340	420
White Pass	55	160	215
Mt. Pilchuck	80	60	140
J.A.S. Inc. Resort	79.7	32.1	111.8
Haystack Mountain	10	307	317
Sugar Bush Valley	25	600	625
Big M	80	130	210
Lookout Mountain	80	347	427
Wildcat Mountain	26	682	708
Evergreen Valley	80	337	417
Loon Mountain	7	660	667
Waterville Valley	44	738	782
Mount Attitash	20	220	240
Dillon Ski Club	18.3	362	380.3
Grizzly Peak	21.8	658	679.8
Kings Hill	80	507.88	587.88
Missoula Snow Bowl	28.6	521.4	550.0
Bridger Bowl	10.3	1,113	1,123.3
Big Mountain	21.1	1,160	1,181.1
Schweitzer Basin	13.8	146	159.8

[1] Not to exceed.

U.S. GOVERNMENT PRINTING OFFICE: 1971